SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000705-001 DT 04/12/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA

THOMAS A ZAWORSKI

v.

GARY W DAVIS (001)

FREDERICK M AEED

CHANDLER CITY-MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

CHANDLER CITY COURT

Cit. No. #02-P-860602; #02-P-860601; #02-P-860600

Charge:
1) EXTREME DUI-BAC .15 OR MORE
1) DUI W/BAC OF .08 OR MORE
1) DUI-LIQUOR/DRUGS/VAPORS/COMBO

DOB: 05/08/59

DOC: 06/02/02

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Sections12-124(A) and 13-4032.

This matter has been under advisement and I have considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

Facts

In a previous criminal case arising from an arrest on July 19, 1998, Appellee, Gary William Davis, entered a plea agreement pleading guilty to two counts: DUI with a B.A.C. over .10, in violation of A.R.S. §28-1381(A)(2); and resisting arrest, in violation of A.R.S. §13-2508.

In this case Appellee was arrested on June 2, 2002, for multiple DUI counts. Appellee entered a plea agreement wherein he pled guilty to Extreme DUI, a violation of A.R.S. §28-1382(A), with one prior DUI conviction. Despite the State's objections, the Chandler City Court allowed Appellee to serve all but the first 15 days in jail on home detention. The State argues that Appellee was not eligible for home detention because his prior conviction of resisting arrest is a crime of violence, thus precluding Appellee from the home detention program. The State now brings the matter before this court, having filed a timely Notice of Appeal.

Issue and Analysis

The first issue is whether a conviction of A.R.S. §13-2508 – Resisting Arrest – constitutes violent behavior under A.R.S. §9-499.07. A.R.S. §9-499.07(B) states:

> A prisoner is not eligible for a prisoner work, community service work and home detention program if any of the following is applicable:
>
> 1. The prisoner is found by the city or town to constitute a risk to either himself or other members of the community.
> 2. **The prisoner has a past history of violent behavior.**
> 3. The sentencing judge states at the time of the sentence that the prisoner may not be eligible for a prisoner work, community service work and home detention program. [emphasis added]

A.R.S. §13-2508(A) reads:

> A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:
>
> 1. Using or threatening to use physical force against the peace officer or another; or
> 2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

A close look at *State v. Samad Sorkhabi*[1] unequivocally shows that resisting arrest is criminal and violent behavior in the State of Arizona. In *Sorkhab*, the court held:

> **The statute's plain language demonstrates that resisting arrest is a crime committed against a person**. Defendant must use or threaten to use **physical force** or any other means that creates a substantial risk of causing physical injury to the peace officer or another to violate § 13-2508. If defendant prevented arrest without using or threatening to use physical force or other means creating substantial risk of physical injury, he *avoids* arrest. Consequently, defendant must demonstrate **criminal conduct** toward an individual, peace officer or another, to commit the crime of resisting arrest.[2] [emphasis added]

Appellee argues that a single conviction of resisting arrest does not constitute a "past history of criminal behavior," as provided in A.R.S. §9-499.07(B). Although Appellee cites out-of-state case law in support of this contention, the claim is without merit in the State of Arizona. Simple logic and effortless semantic reconstruction allows for A.R.S. §9-499.07(B)(2) – "The prisoner has a past history of violent behavior" - to be rephrased: "There is history of violent behavior in the prisoner's past." To answer this question in the case at hand, one would have to answer affirmatively – yes, Appellee did have a history of violent behavior in his past.

In *Shaffer v. Arizona State Liquor Bd.*,[3] the appellant argued that a license revocation was too severe a sanction and an abuse of the Liquor Board's discretion, given Shaffer's "long history and clean record, as well as the isolated nature of [the] incident."[4] Shaffer attempted to convince the court that one incident of criminal behavior could not possibly tarnish a clean history. The court responded:

> Revocation is authorized by law, and nowhere is it restricted to situations involving repeat offenses.[5] [emphasis added]

Similarly, disqualification from the home detention program is authorized by law, and there is nothing in A.R.S. §9-499.07(B)(2) restricting disqualification to situations involving repeated violent behavior. To argue otherwise would strain reason. Appellee did have a history of violent behavior in his past, his conviction for Resisting Arrest, thus making him ineligible for the home detention program, pursuant to A.R.S. §9-499.07(B)(2).

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[1] 202 Ariz. 450, 46 P.3d 1071 (App. 2002).
[2] *Id*. at 452, 46 P.3d at 1073; Also see *State v. Womack*, 174 Ariz. 108, 114, 847 P.2d 609, 615 (App.1992)("Mere flight does not constitute resisting arrest....").
[3] 197 Ariz. 405, 4 P.3d 460 (App. 2000).
[4] *Id*. at 410, 4 P.3d 465.
[5] *Id*. at 411, 4 P.3d 466.

IT IS THEREFORE ORDERED reversing and vacating the sentence imposed by the Chandler City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Chandler City Court for resentencing, and all further and future proceedings.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT